

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
APR -1 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2008-0128
Appellee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MELISSA SUE WELCH,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072658

Honorable Leslie Miller, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

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PELANDER, Chief Judge.

¶1 Following a jury trial, Melissa Welch was convicted of two counts of aggravated assault. The trial court suspended the imposition of sentence and placed her on three years' probation. On appeal, Welch contends the trial court erred by admitting evidence about a "spitting incident" that occurred during an altercation Welch had had with third parties immediately before these assaults. We review a trial court's evidentiary rulings for a clear and prejudicial abuse of discretion. *See State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). We affirm.

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On June 28, 2007, two repossession agents arrived at Welch's residence to repossess a vehicle in her backyard. A man who responded to the agents' knock on the front door eventually agreed to release the car to them. Welch, however, came outside and told the agents to "[g]et the [expletive] off [her] property." They backed up to the sidewalk, but Welch continued to yell expletives and insults at them. At one point, she stated she was going to get a gun from the house and "pop a cap in" them. One of the agents called 911, telling the operator "a gun had been pulled."

¶3 After Welch went back in the house, the agents saw the hatchback go up on the car they were attempting to repossess, and they assumed Welch and the man were getting belongings out of it. One of the agents looked over the backyard gate and attempted to get their attention to ask questions. Welch "ran across the yard, pushed the gate open," and

“slammed” it into the agent. The agent again retreated to the sidewalk where “[m]ore of a confrontation” occurred, during which Welch spit in his face.

¶4 By this time, the two victims in this case, Tucson police officers Deimund and Thomas, had arrived on the scene in response to the 911 call. The officers testified they heard Welch yelling when they arrived and she appeared “agitated.” Deimund saw that Welch had spit on one of the repossession agents and testified he was “afraid that obviously it was going to get more aggressive or they were going to fight.” The officers separated Welch from the agents and asked all of the individuals involved where the gun was. They were told that there was no gun but that Welch had “implied she had a gun near the front door of the house,” had acted “threatening,” and had “reached for a gun inside the doorway.”

¶5 Deimund asked Welch for identification. She responded that she had to get her purse, and she and Deimund began walking back toward the house. Welch then went into the backyard and attempted to shut the gate on Deimund. Deimund, concerned Welch might retrieve a gun, told her to come back out. Welch then “yell[ed] to a guy named Albert,” the man who had originally spoken with the repossession agents and whom Deimund had not yet seen, to bring her purse. Welch “started getting agitated” again and “[c]ame around to the front door.” “[B]elieving there still was a gun inside the doorway, [Deimund] grabbed her arm” and told her not to go inside. Welch then “spun around, punched [Deimund] in [the] mouth, and then continued swinging at [him].” Thomas came to Deimund’s aid, and Welch

hit her too in an ensuing struggle, before she was finally subdued. Deimund suffered a slightly swollen lip, and Thomas suffered minor scratches and scrapes.

¶6 Although Welch had filed a motion in limine to preclude any evidence of her interactions with the repossession agents, during argument on the motion on the first day of trial, she appeared to limit her objection to evidence that she had spit on one of the agents. The trial court denied her motion. On appeal, as she did below, Welch contends the testimony about her spitting was other-act evidence that was precluded by Rule 404(b), Ariz.

R. Evid. That rule provides:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence tending to show a defendant's bad character is admissible if it is relevant and admitted for a proper purpose and its probative value outweighs the danger of unfair prejudice. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007); *see also* Ariz. R. Evid. 402 and 403. But other-act evidence is admissible "absent 404(b) analysis" when the acts are intrinsic to the charged crime. *State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001). "[O]ther acts are intrinsic evidence when they are: (1) so intertwined with the charged acts that they cannot be extracted from the case, (2) 'part of a single criminal episode' with the crime charged, or (3) 'necessary preliminaries to the crime

charged.” *Coghill*, 216 Ariz. 578, ¶ 26, 169 P.3d at 949, quoting *Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d at 736.

¶7 As the above recitation of the facts shows, Welch’s altercation with the repossession agents, which included the spitting incident, was part of a single episode that culminated in the assaults on the two officers.¹ Indeed, Welch appears to concede that much of the evidence about her altercation with the repossession agents was admissible to rebut her claim that she had struck the officers inadvertently or in self-defense. See Ariz. R. Evid. 404(b) (other-act evidence admissible for purposes other than showing action in conformity therewith, including “intent . . . or absence of mistake or accident”). She argues, however, that such evidence constituted “sufficient alternative evidence of [her] aggressive behavior” and that the act of spitting was so potentially prejudicial that it should have been excluded. See *Coghill*, 216 Ariz. 578, ¶ 19, 169 P.3d at 947 (“In the context of Rule 404(b), Arizona courts have emphasized the importance of the trial court’s role in removing unnecessary inflammatory detail from other-act evidence before admitting it.”); see also Ariz. R. Evid. 403 (relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”). We find no abuse of discretion, however, in the trial court’s implicit conclusions that the spitting evidence was neither unnecessary detail nor so

¹Welch contends the state has “forfeited” its argument that evidence of her spitting was inextricably intertwined with other relevant evidence because it did not explicitly argue that theory below. We may affirm the trial court’s ruling, however, “on any basis supported by the record.” *State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004); see also *State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987).

potentially prejudicial, given its probative value and the other evidence of Welch’s behavior, that its exclusion was required. We find unpersuasive Welch’s contention that the act of spitting is so offensive the jury could only have concluded she was “a despicable person who deserve[d] to be convicted, . . . even if she did not assault [the] Officers.” We affirm Welch’s convictions and the probationary term imposed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge